

NTSB Order No.
EM-91

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington D. C.
on the 14th day of September, 1981

J. B. HAYES, Commandant, United States Coast Guard,

vs.

ALEXANDER H ROGERS, III, Appellant

Docket ME-83

ORDER DENYING RECONSIDERATION

By Order EM-83 (served March 10, 1981), the Board reversed the Commandant's revocation, under 46 U.S.C. 239b, of appellant's seaman document (Motorboat Operator's License 147112). The Commandant, by petition dated June 25, 1981, has requested that we reconsider the reversal on the ground that we decided the case on the basis of an issue the Coast Guard was not afforded an opportunity to address.¹ For the reasons that follow, we will deny the petition. The Commandant asserts that (Petition at 5):

"The purported action that the NTSB reviewed and found wanting in this case the decision of a Coast Guard investigating officer to refer to an administrative law judge a single charge of conviction of a narcotics offense. The NTSB stated that because the record contained no explanation of the basis for the

¹Although our rules of procedure for seaman appeals (14 CFR 825) do not provide for reconsideration requests, we have permitted them as a matter of discretion. See Commandant v. Neilson, 2 NTSB 2694 (1974). Such petitions, however, should be filed within a reasonable time after the decision sought to be reconsidered. In the absence of some explanation why the petition here could not have been filed sooner, we do not believe a request submitted some three and a half months after our decision can be deemed to have been filed within a reasonable time. We think a party in marine cases should be able to reach a decision respecting reconsideration within thirty days, the time limit specified in our rules for aviation proceedings. See 14 CFR 821.50.

investigating officer's determination to refer charges leading to revocation, it was unable to conduct its review and therefore the revocation order must be reversed.

From this the Commandant argues that the Coast Guard should have been permitted to address the issue of the necessity for the investigating officer to explain his determination respecting the referral of the charge. The Commandant further contends that the investigating officer's action in this regard is essentially a matter of prosecutorial discretion which is "inherently not reviewable" (id).

We think the Commandant has incorrectly characterized the basis for our holding in Order EM-85. Specifically, we did not reverse the revocation order because we were unable to discern why the the investigating officer determined to file a charge in this instance. Indeed, we fully agree with the Commandant's position that an investigating officer's prosecutorial discretion in this connection ordinarily would not be subject to our review. This does not mean, however, that the sanction ultimately resulting from the exercise of such discretion can be shielded from the review function we are mandated by statute to perform.

With these considerations in mind, our decision unambiguously stated that "the revocation order must be reversed because of the Commandant's failure to exercise the discretion afforded him under Section 239b in a manner which permits effective review of his revocation decision "(Order EM-85, at 2, emphasis added). We noted that neither the Commandant nor the law judge had discussed the sanction in relation to the circumstances underlying the State court drug conviction, about which the record contained no information, and we stated that we had "absolutely no basis for assessing whether revocation for that offense was a permissible exercise of discretion." (id at 5). Our reference to the absence in the record of the reasons why the investigating officer preferred charges thus was not an attempt "to probe [his] mental process" (see Petition at 5) On the contrary, it was merely intended to indicate that the propriety of the Commandant's sanction decision could not be evaluated even in light of whatever factors the investigating officer might have considered.

It follows from the foregoing that the instant petition presents no issue warranting reconsideration.

ACCORDINGLY, IT IS ORDERED THAT:

The petition for reconsideration is denied.²

KING, Chairman, DRIVER, Vice Chairman, McADAMS, GOLDMAN and BURSLEY, Members of the Board, concurred in the above order.

²Our disposition moots the Commandant's request for a stay of Order EM-,K pending our decision on the reconsideration petition.